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IN THE

Supreme Court of the United States

October Term, 1981

LEON ROSEN,

Respondent,

vs.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL PENSION FUND,

Petitioner,

and

VICTOR P. CIVATTE,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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Questions Presented for Review

1. Does a pension plan trustee's fiduciary duty require him to "take action" against an employer who fails to make contributions to a multi-employer pension plan?

2. Where a trustee erroneously accepts the pension contributions of an employee who has already forfeited his accumulated credited service, is the fund estopped to deny the employee's eligibility for pension?

List of Parties Involved

Pursuant to the Rules of this Court, the following were parties in the Court whose judgment is sought to be reviewed:

Leon Rosen

Hotel and Restaurant Employees and Bartenders Union of Philadelphia, Bucks, Montgomery and Delaware Counties, Pennsylvania, Local 274

Hotel and Restaurant Employees and Bartenders International Pension Fund

Victor P. Civatte

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Opinions Below

The opinion of the United States Court of Appeals for the Third Circuit, as yet unreported, appears in the Appendix to this petition, *infra* p. 14a. The opinion of the United States District Court for the Eastern District of Pennsylvania, also unreported, appears at page 3a of the Appendix.

Jurisdiction

The Judgment Order of the United States Court of Appeals for the Third Circuit was issued and entered on February 23, 1981. A timely Petition for Rehearing was denied on March 20, 1981 (34a). This Court extended petitioners' time in which to file a Petition for Certiorari until August 17, 1981, by order of June 5, 1981 (36a). This petition has been filed before August 17, 1981. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutes Involved

Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any District Court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

29 U.S.C. §185(a); Labor-Management Relations Act §301(a)

Fiduciary duties

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and—

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .
>
> ERISA 29 U.S.C. §1104(a)(1)(A) and (B)

Statement of the Case

This action was initially filed in the Court of Common Pleas of Philadelphia County, Pennsylvania, and removed to the United States District Court for the Eastern District of Pennsylvania pursuant to the provisions of 28 U.S.C. §1441. Federal jurisdiction was based on §301(a) of the National Labor Relations Act, 29 U.S.C. §185(a). Plaintiff alleged a breach of a pension fund agreement which was part of a §301 collective bargaining agreement. Plaintiff seeks full pension benefits from all defendants.

In October of 1967, pursuant to a collective bargaining agreement, plaintiff's union, Local 111, and several employers established an entity known as the Local 111 Pension Plan (hereinafter the "Plan"). The collective bargaining agreement installed four (4) trustees, two representing Local 111, and two representing the employers. Co-defendant, Victor P. Civatte (hereinafter "Civatte") was one of the union trustees and an officer of Local 111. Co-defendant, Local 274 is the successor of Local 111, and co-defendant, Hotel and Restaurant Employees and Bartenders International Union Pension Fund (hereinafter the "Fund") is by merger the successor to the Local 111 plan. This petition is joined by co-defendants, the Fund and Civatte, both of whom were held liable to the plaintiff for full pension benefits by the Third Circuit Court of Appeals, which reversed the District Court's judgment for all defendants.

The plan established in 1967 provided pension benefits for union members who attained the age of sixty-two (62) and who earned fifteen (15) years of "credited service". At the plan's inception, the plaintiff, Leon Rosen (hereinafter "Rosen"), was awarded nine (9) years of "credited service" by virtue of his union membership since 1958. In order to earn "credited service" after 1967, an employee was required to work a specified number of hours for employers who made specified contributions to the Fund at required intervals. The issue central to this litigation is whether Rosen is entitled to "credited service" for the years 1967-1973 even though his employers never submitted contributions in his behalf. If so, then he has the fifteen (15) years necessary to qualify for a pension. If not, then he doesn't qualify.

In 1967, Rosen worked at the Walnut House Restaurant, a unionized restaurant where he was the only employee represented by Local 111. His employers were his sister and brother-in-law, the Specters. The Specters were obligated by the collective bargaining agreement entered into with Local 111 to contribute approximately Two ($2.00) Dollars per week to the Plan; however, they refused to submit these contributions. Civatte and another official of Local 111 made numerous personal visits to the Specters and demanded payment but, the Specters claimed that they could not afford them because the restaurant was having financial difficulties.

In 1969, the Specters sold the Walnut House to a Mr. Herman Kane who was Rosen's employer until 1971 when he sold the restaurant to a Mr. Gonzalez who owned it until it closed in 1974. Neither Kane nor Gonzalez submitted any contributions in behalf of Rosen, despite the fact that Civatte made personal demands to each, as he had the Specters.

In 1971, Civatte provided Rosen with a tabulation of his employers' arrearages for the years 1967-71 which totalled Four Hundred Nineteen Dollars and Twenty ($419.20) cents. Rosen was willing to pay his employers' delinquencies and Civatte accepted from Rosen a check for that amount. The trial court did not make any factual determinations as to what representations Civatte might have made to Rosen concerning his chances of overcoming his ineligibility by means of this payment.

After 1971, Rosen's employers still refused to submit contributions and Rosen made no attempt to pay the money himself. Thus, for the period 1971-1973, the Fund received no contributions in Rosen's behalf.

In 1976, Rosen applied for a pension valued at approximately Forty-eight ($48.00) Dollars per month. At this time, the Fund sent Rosen a check for Six Hundred Eighty-two Dollars and Eighty-three ($682.83) cents which was the amount of Rosen's self-payment plus interest. However, the Fund denied Rosen's application for a pension. Rosen then filed suit.

The District Court found for all defendants. The Court held that Rosen was ineligible for pension because no contributions were submitted in his behalf for the period 1971-1973. Thus, the District Court did not reach the issue of whether the Fund was estopped to assert Rosen's ineligibility for the period 1967-1971. Additionally, the District Court rejected Rosen's theory that Civatte and the Fund breached the fiduciary obligation they owed him in not instituting suit against the Specters or his other employers. The Court held that the trustees pursued "a policy of enforcement consistent with Rosen's interest" (9a). Rosen appealed.

The Third Circuit Court of Appeals reversed the District Court with respect to the Fund and Civatte. With regard to the period 1967-1971, the Court held that Civatte's acceptance of Rosen's check in 1971 estopped the Fund from asserting any eligibility defects (23a). As for the period 1971-1973, the Court held that Rosen's lack of credited service was caused by the defendants' breach of their fiduciary duty (27a). The Court applied the fiduciary requirements of the Employee Retirement Income Security Act (ERISA) 29 U.S.C. §1104 and held that Civatte and the Fund had an obligation to "take action" against Rosen's employers (31a). The Court determined that Civatte's numerous personal demands for payment were not sufficient to discharge this obligation (32a). The Appeals Court awarded Rosen "the benefits that would have accrued to Rosen had [the defendants] fulfilled their fiduciary duties" (32a).

REASONS FOR GRANTING THIS WRIT

1. The Court of Appeals has decided an important question relating to a pension plan trustee's fiduciary duty which has profound consequences for the administration of pension plan trusts and which has not been decided by this Court.

Prior to this decision by the Court of Appeals a series of cases deriving from *Danti v. Lewis*, 114 U.S. App. D.C. 105, 312 F.2d 345 (1962) had developed a standard for review of trustee decisions by the Courts. This standard enunciated that trustee decisions will be reversed only where evidence exists to prove that such decisions are arbitrary, capricious or made in bad faith, not supported by substantial evidence, or erroneous on a question of law. By virtue of federal jurisdiction over cases

such as this involving an individual claim to pension trust benefits, the federal courts in rendering their decisions in *Danti (supra)* and the cases following it were not merely applying the general common law of the forum state as a mere exercise of their diversity jurisdiction; rather, they were pronouncing a rule of federal common law applicable in all similar cases, *Rehmar v. Smith, et al.*, 555 F.2d 1362 (1976).

Those institutional arrangements which create welfare and pension trust funds and specify their purposes are cast in a fiduciary form, and in order to give meaning to the rights of beneficiaries involved in any fiduciary relationship the Courts have always found it necessary to subject the conduct of the fiduciaries to judicial review and correction, *Kosty v. Lewis*, 319 F.2d 747; 115 U.S. App. D.C. 343. Where, however, the instrument which defines the fiduciary duties gives the fiduciaries broad discretion, as is generally the case with welfare and pension trusts, the Courts have limited their review and intervene in fiduciary decisions only where the trustees have acted arbitrarily and capriciously towards one of the persons to whom their trust obligations run.

In overturning the District Court, the Court of Appeals, however, has removed the vital element of fiduciary discretion and has held that:

> "... defendants status as fiduciaries requires them to 'take action' against employers who fail to contribute to the fund as required by the plan. This obligation could require the trustees to commence suit, or to picket the non-contributing employer; but some action must be taken to safeguard beneficiaries' credited service" (31a).

One application of the "take action" standard compels trustees to picket a non-contributing employer. This requirement reflects a fundamental lack of understanding

by the Court of Appeals as to the function of the Pension Fund and its trustees. The proper party to picket is the local union and its membership on whose behalf the pension agreement is negotiated. However, the Court of Appeals dismissed the local as lacking fiduciary duty. The four pension trustees in this instance do not have the manpower or resources to erect a picket line to coerce payments. In addition, the pension fund is now administered from a foreign jurisdiction, whereas the union and its members are locally based. A dilemma which exists regardless of who must picket, is that marginal businesses which are not making payments due to poor business conditions (such as in the present case) may close their doors to the harm of the employees who may lose their jobs. In the present case if the picketing standard were applied a mass effort would be expended to collect a weekly contribution of Two ($2.00) Dollars for the one local union employee. The other "take action" option is to file suit for enforcement of the agreement, but this places the fiduciary in a position that may, as in this case, dictate against common sense in that the costs of suit would far outweigh the benefit to be gained, to the detriment of the Fund. The Court of Appeals, however, by this decision, has left no middle ground, and the trustee risks personal liability if he does not "take action". This creates a conflict between protection against his incurring personal liability and his making prudent decisions in the best interests of the Fund and its beneficiaries. At its worst, the "take action" standard is vague, uncertain and subjects a trustee to unknown risks without sufficient guidelines as to what actions will satisfy the standard. It should also be noted that the trustees did take action, albeit unsuccessful, namely personal visits of a dunning nature to the employers.

The Appeals Court's finding of a requirement to "take action" is based on the fiduciary requirements of ERISA and that of the common law (pp. 28a-32a)[1]. The Court cited the provisions of ERISA 29 U.S.C. §1104(a)(1)(A) and (B) which reads as follows:

> §1104 Fiduciary duties
>
> (a) Prudent man standard of care
>
> (1) Subject to sections 1103(c) and (d), 1342 and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and —
>
> (A) for the exclusive purpose of:
> (i) providing benefits to participants and their beneficiaries; and
> (ii) defraying reasonable expenses of administering the plan;
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . . (28a).

The Court of Appeals does not specify which language of the above provisions suggests a trustee's duty to remedy the ineligibility of a potential beneficiary by undertaking a lawsuit. Nor, does the Court explain how

[1] Rosen's pension was denied in 1976 one year after the effective date of ERISA's fiduciary provisions (January 1, 1975). Civatte's alleged breach however, occurred during the years 1971-1973, prior to the ERISA provisions. Thus, the Appeals Court's application of these provisions may have been erroneous in view of *Morgan et al. vs. Laborers Pension Trust for N. Cal.*, 433 F.Supp. 518 (1977) which held that Congress did not intend that "any ERISA provision will apply to *conduct* occurring prior to the dates specified". 433 F.Supp., at 524. Petitioners request this Court to review the Appeals Court's holding as to ERISA's retroactive effect (See Fn.5, 21a) as well as its interpretation of the fiduciary requirements contained in ERISA and the common law.

the above language was meant to relate to a trustee's eligibility determinations. In view of the title "(a) Prudent man standard of care" which immediately precedes the paragraphs cited by the Court, and in view of the succeeding paragraphs (all of which concern the management and investment of plan asserts) it seems clear that Congress in enacting the fiduciary duty provisions of ERISA, intended only to establish the basic standard governing a trustee's management and investment of plan assets, and did not intend to supplant the large body of federal common law which previously defined a trustee's obligation with regard to the eligibility of a potential beneficiary. It was stated in *National Labor Relations Board v. Amax Coal Company, A Division of Amax, Inc., et al., and United Mine Workers of America, Local No. 1854, et al. v. National Labor Relations Board, et al.*, 49 L.W. 4880, _____ U.S. _____:

> "... we must infer that Congress intended to impose on trustees traditional fiduciary duties unless Congress has unequivocably expressed an intent to the contrary." (49 L.W. 4882)

Yet the Court of Appeals has interpreted this section to place unprecedented collection obligations upon trust funds and their trustees in behalf of these potential beneficiaries.

The only case prior to *Rosen* in which a Court held that a pension fund or its trustee could be liable for not taking action against non-contributing employers was *Nedd vs. United Mine Workers of America*, 556 F.2d 190 (3rd Cir. 1977), cert. denied, 434 U.S. 1013 (1978). In *Nedd*, the delinquent employers were 120 mine operators who owed approximately 12 million dollars to the Fund after 16 years of delinquencies. The Fund itself was dominated by union designated trustees (in violation of

the Labor Management Relations Act, 1947, §302(c)(5), 29 U.S.C.A. §186(c)(5)). These trustees did not take action against the employers because they feared that it would result in a loss of union members' jobs. The Court held that the trustees may have breached their fiduciary duty to the pensioners by consciously subordinating their interest to that of the workers. The case was remanded.

In the present case, the trustees were equally represented by the union and the employers and there is no suggestion that the trustees consciously acted against Rosen's interest. Civatte himself made numerous personal demands to Rosen's employers for contributions (10a). Moreover, a lawsuit may have been against Rosen's interest not only because the restaurant was in financial difficulty and Rosen might have lost his job, but also because during the initial years of non-contribution, Rosen was a relative of his employers (10a).

Additionally, in *Nedd* a lawsuit was warranted by the amount of money at stake (12 million dollars). In the present case, however, a lawsuit would have cost more than the amount of the delinquencies.

The Court's standard of review at federal common law is limited to determining whether the trustee's action is "arbitrary and capricious". *Danti v. Lewis*, 114 U.S. App. D.C. 105, 312 F.2d 345 (1962). This is the standard which the Appeals Court purported to apply (21a). However, with the exception of the *Nedd* case which presents an instance of gross trustee inaction, courts have never utilized this standard of review to obligate a pension fund or its trustees to institute suit against a non-contributing employer. Moreover (except for the

Nedd case), courts have never accepted the proposition that a pension fund could be compelled to pay benefits even though the core contributions which support those benefits were never submitted. Rather, court's applying the "arbitrary and capricious" standard have overturned trustee's eligibility determinations only in cases where the contributions have been submitted in behalf of the plaintiff and the trustee's interpretation of some less fundamental eligibility provision is in question. *E.g., Rehmar v. Smith et al.*, 555 F.2d 1362 (1976); *Norton et al. v. I.A.M. National Pension Fund*, 563 F.2d 1352 (1977); *Aitken v. I.P. & G.C.U. Employer Retirement Fund*, 604 F.2d 1261 (1979).

The Appeals Court also concluded that Civatte and the Fund failed to notify Rosen of his employer's non-contribution, and that this too constituted a breach of their fiduciary duty. However, Rosen's knowledge as to his employer's delinquencies is not at issue in this case. Civatte testified that Rosen knew well before 1971 that contributions were not being made and the District Court noted its disbelief of Rosen's testimony to the contrary. Moreover, in 1971, when Rosen discussed the problem with Civatte, he admittedly became aware that contributions were not being made. Thus, the Appeals Court finding that Civatte and the Fund breached a duty to notify Rosen is not supported by the facts of this case.

> "... Rosen claims he did not know prior to 1971 that his employer was not making payments to the Fund. This contention is doubtful in light of Civatte's testimony to the contrary (Tr. 59) and because Rosen's employer, for part of the time, was his sister and brother-in-law. It is clear, however, that in 1971 Rosen learned that payments were not being made, yet Rosen did nothing thereafter to verify his employer's contributions. Unlike *Nedd*,

> where the pensioners urged the trustees to collect the delinquent funds, Rosen was indifferent and pressured neither the trustees, the employer nor the union to secure the contributions. Given the condition of the restaurant industry at the time, a suit by the trustees to collect the funds was not a very practical solution since it may have forced the closing of the restaurant and the loss of Rosen's job. I am satisfied that the trustees pursued a course of action that was in plaintiff's best interest and did not breach any fiduciary duty owed him." (Appendix A, p. 10a).

The pension fund trustees bear duties to two classes of individuals: vested beneficiaries and non-vested plan participants (such as Leon Rosen). At times the trustees must exercise discretion as to what action to take when the choices to be made concerning the two classes conflict. Under traditional principles of equity a trustee bears an unwavering duty of complete loyalty to the beneficiary of the trust, to the exclusion of the interests of all other parties, *Restatement (Second) of Trusts,* §170(1); *2 Scott on Trusts,* §170. If this traditional principle is to remain viable, the Court of Appeals decision in *Rosen* must be overturned. It has long been an established principle that the actuarial soundness of pension funds is of paramount importance. The *Rosen* decision, however, will augment administrative costs and overhead without permitting the trustees to determine what is in the best interests of all concerned including protecting the financial integrity of the Fund.

2. The Appeals Court has decided an important question of Federal Law on which the Circuit Courts are divided.

The Appeals Court held that Civatte's acceptance of Rosen's self-payment of his employers' four-year delinquency from 1967 to 1971 estops the Fund from asserting that Rosen failed to earn credited service during that period (179).[2] Prior to the payment the federal courts have been reluctant to interfere with the determinations of pension plan fiduciaries except in those cases where the determination was arbitrary or capricious or failed to meet the other standards outlined in *Danti v. Lewis, supra.* Use of the principle of estoppel as a theory for relief in pension eligibility cases was discussed but not employed until the Seventh Circuit Court of Appeals affirmed the holding of the Eastern District Court of Wisconsin in *Scheuer v. Central States Pension Fund,* 358 F.Supp. 1332 (E.D. Wis. 1975), on rehearing 394 F. Supp. 193 (E.D. Wis. 1975) aff'd, 570 F.2d 347 (1977).

In *Scheuer* the Court explained:

> "The sui generis nature of the pension agreement . . . should not immunize it from the equitable principles that govern similar agreements. The rising ethical standards in business relations which the estoppel doctrine is designed to enforce are no less

[2](p. 23a) The fund asserted two eligibility defects only one of which is referred to in the Appeals Court opinion. First, that under Art. I, Sec. 10 of the plan which requires an employee to earn one-half (½) year of credited service in any two consecutive plan years, Rosen lost his accumulated credited service in 1969 after two (2) years of delinquencies. Second, that Rosen's payment as an *employee* was impermissible under Art. II, Sec. 1, providing for *employer* payment of contributions.

> needed in the administration of pension funds." *Peoples National Bank of Little Rock v. Linebarger Construction Co.*, 219 Ark. 11, 17, 240 S.W. 2d 12 (1951). (394 F.Supp., at 1338).

The Court concluded:

> "... estoppel may be a basis for relief in actions by employees to receive pension benefits." (394 F.Supp., at 1338).

On the other hand in two post-ERISA cases the estoppel doctrine was expressly rejected by the Ninth Circuit in *Thurber v. Western Conference of Teamsters Pension Plan et al.*, 542 F.2d 1106 (1976) and again in *Aitken v. I.P. & G.C.U. Employer Retirement Fund*, 604 F.2d 1261 (9th Cir. 1979). The *Thurber* case presented facts similar to the instant case in which an employee attempted to cure a "break-in-service" after the two-year deadline has passed. The Court stated:

> "... it was illegal for the Pension Fund to receive the retroactive contribution in an attempt to heal the break-in-service. It would likewise be illegal for the fund to pay benefits to Thurber based upon the illegal retroactive contribution." (524 F.2d, at 1109).

The Court concluded that to apply the estoppel doctrine would be to compel an illegal act.

> "The fact that Thurber relied on representations of an employee of the firm retained to administer the trust fund would not estop the Pension Fund and its trustees from denying Thurber's eligibility for the Pension. The rights of other pensioners must be considered, and the trust fund may not be deflated because of the misrepresentation or misconduct of the Administrator of the fund. We agree with the District Court that the doctrine of estoppel may not be invoked to compel an illegal act." (at 1109) (524 F.2d, at 1109).

In *Aitken, supra,* the Court cited the *Thurber* language extensively concluding:

> "... Thurber controls our disposition of the estoppel claim here." (604 F.2d, at 1267).

The Eighth Circuit has also rejected the estoppel doctrine's applicability to pension eligibility disputes. *Phillips v. Kennedy,* 542 F.2d 52 (1976). The Court's reasoning in *Phillips* echoed *Thurber's* concern for the "rights of other pensioners", 524 F.2d, at 1109.

> "The actuarial soundness of pension funds is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan." (542 F.2d, at 55).

Thus, the Circuit Courts are divided on the question of the estoppel doctrine's applicability to pension disputes.

The version of the estoppel doctrine applied by the Court of Appeals here is particularly novel. The Court of Appeals found the "elements" of estoppel present (23a) even though the lower court made no determination of fact as to any representations Civatte might have made to Rosen at the time he accepted his payment. In addition Rosen introduced no evidence at trial which would indicate detrimental reliance. The *Scheuer* Court made a careful inquiry into the facts of the case (358 F.Supp. (1338 *et seq.*)) to determine whether the elements of estoppel were present. The Appeals Court in the instant case, however, appears to see in Civatte's mere acceptance of Rosen's pension contribution an estoppel as a matter of law. This liberal application of the estoppel doctrine without the necessary evidentiary basis poses an even greater threat to the actuarial soundness of pension funds that the more cautious application embraced by

the Seventh Circuit and rejected by the Eighth and Ninth Circuits. As the District Court found, Rosen was required to show that his employers had made payments until September, 1973.

> "Since it is Rosen's burden to demonstrate his eligibility, *Feathers v. Health and Retirement Funds*, No. 76-1085 (D.C.D.C. 1978) 99 LRRM 2287, the Court must conclude that the trustees' decision was not arbitrary and capricious, but was mandated by the terms of the plan. No evidence was offered at trial to show that employer payments were made subsequent to 1971. In my memorandum denying summary judgment, I ruled that estoppel may provide a basis for relief in actions by employees to recover pension benefits, but even assuming defendants are estopped from denying that employer contributions were made for the period 1967 to 1971, there is no basis in the record for applying this principle for the period 1971 to 1973. When Civatte informed Rosen that his employer was in arrears, he provided Rosen with a detailed statement of the amount due. This statement showed that the money was for the period prior to November, 1971. Thus Rosen knew that this payment did not assure him of a pension, but merely brought his account up to date. Civatte's acceptance of Rosen's check does not prevent the Fund from denying that employer contributions were made after 1971, and, therefore, Rosen is ineligible for a pension." (7a).

In view of the substantial liability to which estoppel claims may expose pension funds by way of increased litigation and by way of increased benefit payments, and in view of the conflict which presently exists among the Circuit Courts as to whether such claims should be allowed, Petitioners request this Court to review the Third Circuit Court of Appeals' application of estoppel in the instant case.

Conclusion

The Court of Appeals by its decision has enunciated a new standard for pension plan trustees requiring them to "take action" against employers who fail to contribute to employee pension plans at risk of incurring personal liability for failure to do so. The Court of Appeals fails to specify guidelines as to actions that will fulfill the requirements of this vague standard with the exception of picketing or filing suit, alternatives which may deprive pension plan trustees of the right to exercise discretion in determining what avenue to take to both meet their fiduciary obligation and to protect the sometimes conflicting interests of vested plan beneficiaries and non-vested plan participants. In addition, by adopting a principle of estoppel to establish liability on behalf of the pension plan, the Court of Appeals has added to an existing conflict of decisions among the circuits.

WHEREFORE, Petitioners respectfully request this Court to review the decision of the Third Circuit Court of Appeals on these issues.

Respectfully submitted,

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APPENDIX A

Order and Opinion of Honorable Joseph L. McGlynn, Jr.—Filed March 31, 1980

IN THE UNITED STATES DISTRICT COURT

For the Eastern District of Pennsylvania

LEON ROSEN,

v.

HOTEL RESTAURANT EMPLOYEES & BARTENDERS UNION OF PHILADELPHIA, BUCKS, MONTGOMERY and DELAWARE COUNTIES, PENNSYLVANIA, LOCAL 274

and

HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION PENSION FUND

and

VICTOR P. CIVATTE.

Civil Action
No. 77-4252

FILED
Mar 31 1980
Michael E. Kunz, Clerk
By (illegible) Dep. Clerk

Appendix A—Order and Opinion of Honorable Joseph L. McGlynn, Jr.—Filed March 31, 1980.

ORDER

AND NOW, this 31st day of MARCH, 1981, it is hereby

ORDERED that judgment be and the same is hereby entered in favor of the defendants and against the plaintiff.

BY THE COURT:

JOSEPH L. McGLYNN, JR.
Joseph L. McGlynn, Jr., *J.*

4/1/80 copies to
Martin Leonard
Warren Boush
Robert Costigan
Michael Kunz
Legal
Dan Spitz

Appendix A—Order and Opinion of Honorable Joseph L. McGlynn, Jr.—Filed March 31, 1980.

OPINION DATED MARCH 31, 1980

(pp. 93a-99a)

IN THE UNITED STATES DISTRICT COURT
For the Eastern District of Pennsylvania

LEON ROSEN,

v.

HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS UNION OF PHILADELPHIA, BUCKS, MONTGOMERY and DELAWARE COUNTIES, PENNSYLVANIA, LOCAL 274

and

HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION PENSION FUND,

and

VICTOR P. CIVATTE.

Civil Action
No. 77-4252

FILED
Mar 31 1980
Michael E. Kunz, Clerk
By (illegible) Dep. Clerk

Appendix A—Order and Opinion of Honorable Joseph L. McGlynn, Jr.—Filed March 31, 1980.

MEMORANDUM OF DECISION

MC GLYNN, *J.* MARCH 31, 1980

Before the Court is a suit brought by Leon Rosen against the Hotel and Restaurant Employees and Bartenders Union (hereinafter Local 274), the Hotel and Restaurant Employees and Bartenders Union Pension Fund (hereinafter the Fund), and Victor P. Civatte, a former trustee of the Fund. Plaintiff is seeking pension benefits from the Fund.[1] Jurisdiction is based on §301 of the National Labor Relations Act. 29 U.S.C. §185 (1976).

FACTS

From January, 1958 until June, 1976, plaintiff was a dues paying member of Local 274. (Local 274 succeeded the Chefs, Cooks, Pastry Cooks and Assistants Union, Local 111 (hereinafter Local 111)). As a result of a collective bargaining agreement, there was created a separate entity known as the Local 111 Pension Plan to provide for those union members who attain the age of sixty-two (62) years; and who also accumulate at least fifteen (15) years of credited service. Credit was given for years of service between January, 1958 when the union was formed and October, 1967 when the pension plan was established. Defendant Victor P. Civatte was one of the trustees of the Plan. Local 111 merged into Local 274, and in 1975, the Plan merged with the defendant Fund.

[1] Plaintiff filed a motion for summary judgment in which he raised many of the issues discussed in this opinion. The motion was denied. *Rosen v. International Pension Fund, et al.*, No. 77-4252 (E.D. Pa. March 21, 1979).

Appendix A—Order and Opinion of Honorable Joseph L. McGlynn, Jr.—Filed March 31, 1980.

From 1958 to 1974, plaintiff worked in the Walnut House, a unionized restaurant. Both plaintiff and his employer were obligated to make contributions to the Plan (and later the Fund). From 1967 to 1971 plaintiff paid his share as an employee, but his employer never made any contributions. In 1971, Civatte, as trustee of the Fund, advised plaintiff that his pension was in jeopardy due to his employer's failure to make payments. Civatte provided plaintiff with a tabulation of the amount owed. On November 3, 1971, plaintiff paid the Plan $419.20 of his own funds, the total amount of arrearages owed by his employer for the period October, 1967 to November, 1971. However, even after November, 1971, plaintiff's employer made no contributions to the plan. This deficiency was not advanced by Rosen, although he continued to pay his employee's share.

In 1975, plaintiff applied for a pension. In a letter dated May 18, 1976, the Fund stated that their records showed that plaintiff had a total of fifteen years credited service but that he had not yet reached the minimum age of sixty-two years. Rosen continued working until his sixty-second birthday and in June, 1976 he reapplied for a pension. The Fund again rejected his application, responding that Rosen's employer had not remitted contributions on his behalf for the period October, 1967 to November, 1971, and that his subsequent employer had not made contributions for the period February, 1974 to May, 1975.[2] Rosen was also informed that the Fund did not "allow for payment of contributions to the Fund by an employee for the purpose of acquiring credited service

[2] The period from February, 1975 to May, 1975 is not at issue in this case as Rosen would have had fifteen years of service as of September, 1973.

toward a pension benefit." Therefore, Rosen had suffered a break in service and was not eligible for a pension. Rosen's prior payment, accepted by Civatte, was returned with interest.

DISCUSSION

The issues presented are: 1) whether the determination that the plaintiff did not meet the requirement of fifteen years of credited service was arbitrary and capricious; 2) if this requirement was not met, whether defendants are estopped from asserting this as a defense; and 3) whether the Fund can be held liable for not insuring that Rosen's employer made the requisite payments to the Fund.

Plaintiff argues that the pension fund requirements call for contributions to be submitted on an employee's behalf; nothing precludes him from making payments on his own behalf. Plaintiff contends that his payment to Civatte corrected his employer's delinquency so he suffered no break in service. Therefore, the trustees' determination that he was ineligible for a pension was arbitrary and capricious.

Plaintiff correctly states the standard of review; the trustees' decision will stand unless it is arbitrary and capricious in light of the language of the plan. *Reiherzer v. Shannon*, 581 F.2d 1266, 1272 (7th Cir. 1978); *Phillips v. Kennedy*, 542 F.2d 52, 54 (8th Cir. 1976); *Gomez v. Lewis*, 414 F.2d 1312, 1314 (3rd Cir. 1969). To be eligible for a pension, the plan requires that an employee have fifteen years credited service. This is not disputed. But even if Rosen is credited with service until November, 1971, he is still two years shy of the requisite number of years. Rosen

would not have attained fifteen years service until September, 1973.[3] (Tr. 102). Therefore, apart from whether Rosen's payment on his own behalf was proper, Rosen was required to show that his employer made payments until September, 1973. Since it is Rosen's burden to demonstrate his eligibility, *Feathers v. Health and Retirement Funds*, No. 76-1085 (D.C.D.C. 1978) 99 LRRM 2287, the Court must conclude that the trustees' decision was not arbitrary and capricious, but was mandated by the terms of the plan. No evidence was offered at trial to show that employer payments were made subsequent to 1971.[4] In my memorandum denying summary judgment, I ruled that estoppel may provide a basis for relief in actions by employees to recover pension benefits, but even assuming defendants are estopped from denying that employer contributions were made for the period 1967 to 1971, there is no basis in the record for applying this principle for the period 1971 to 1973. When Civatte informed Rosen that his employer was in arrears, he provided Rosen with a detailed statement of the amount due. This statement showed that the money was for the period prior to November, 1971. Thus,

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[3] In the letter dated May 18, 1976, the Fund stated that Rosen had fifteen years of credited service. While the plaintiff did not raise this issue, the Court notes that this does not estop the Fund from later denying this after further check of their records. *See, Feathers v. Health and Retirement Funds*, No. 76-1085 (D.C.D.C. 1978) 99 LRRM 2287.

[4] Because plaintiff was unaware until trial that he had to show that payments were made during this time, the Court allowed an additional two weeks for submission of evidence on this point. None was offered.

Rosen knew that this payment did not assure him of a pension, but merely brought his account up to date. Civatte's acceptance of Rosen's check does not prevent the Fund from denying that employer contributions were made after 1971, and, therefore, Rosen is ineligible for a pension.

Plaintiff's final contention is that defendants breached their fiduciary duty by not collecting the delinquent employer payments. Rosen would have received a pension had these payments been made.

It is clear that the union had no duty to see that the employer contributions were made. The local union is a separate entity which does not have any right of control over the trust funds and its assets. *United States v. Santiago,* 528 F.2d 1130, 1133 (2d Cir.), *cert. denied,* 425 U.S. 972 (1976); *Lewis v. Seanor Coal Co.,* 256 F. Supp. 456, 461 (W.D. Pa. 1966), *aff'd,* 382 F.2d 437 (3rd Cir. 1967), *cert. denied,* 390 U.S. 949 (1968).

The trustees of a pension fund and the fund itself owe a fiduciary duty to potential pensioners. A pension fund's trustees "have fiduciary duties in connection therewith as do any other trustees." *United Marine Division v. Essex Transportation Co.,* 216 F.2d 410, 412 (3d Cir. 1954). In *Nedd v. United Mine Workers of America,* 556 F.2d 190 (3d Cir. 1977), *cert. denied,* 434 U.S. 1013 (1978), the court stated that trustees have an obligation to enforce pension agreements with "the standard of care of common skill, common prudence and common caution which reasonable men would be expected to exercise with respect to their own property." *Id.* at 213. The pen-

sioners in Nedd charged that the trustees failed to vigorously pursue the delinquencies of over $12,000,000 because to do so would have forced mine closing, costing union members jobs.[5] *Id.* at 207-208. The Court held that the trustees breached their fiduciary duty to the pensioners by subordinating their interest to that of union workers.

The present case is distinguishable from *Nedd* in that Civatte and the other trustees pursued a policy of enforcement that was consistent with Rosen's interest. The trustees did visit Rosen's place of employment[6] in an effort to collect the delinquencies. The owner would not pay, claiming that the business was in financial difficulty and he could not afford the payments.[7] (Tr. 58, 79). They considered picketing the establishment but felt that Rosen would not want this as his employer at the time

[5] *Nedd* involved a structural violation of the Labor Relations Management Act, 29 U.S.C. §186(c)(5), in that the union was over-represented in the number of trustees of the fund. 556 F.2d at 207-209. This is why they followed a policy which favored union workers. Although no structural violation is involved here, the fiduciary standards articulated in *Nedd* are applicable.

[6] Rosen worked at the Walnut House, a restaurant at 23rd and Walnut, until 1974, the relevant time period in this case.

Although the testimony was not precise; it appears that Rosen's sister and brother-in-law ran the restaurant until 1969. From 1969 to 1971, it was owned by a Mr. Kane who sold it to a Mr. Gonzales who owned it until it closed in 1974. (Tr. 9-10, 57).

[7] Civatte testified that from 1966 to 1976 about 110 restaurants had to close because of bad business.

While Rosen was the only member of Local 111 employed at the Walnut House, other employees were members of a different union, local 301. (Tr. 55-56).

was his sister and brother-in-law. (Tr. 68). Finally, the trustees did discuss the matter with legal counsel but no legal action was taken. (Tr. 68).

These policies were consistent with the degree of diligence that Rosen exercised to secure his pension. Rosen claims he did not know prior to 1971 that his employer was not making payments to the Fund. This contention is doubtful in light of Civatte's testimony to the contrary (Tr. 59) and because Rosen's employer, for part of the time, was his sister and brother-in-law. It is clear, however, that in 1971 Rosen learned that payments were not being made, yet Rosen did nothing thereafter to verify his employer's contributions. Unlike *Nedd*, where the pensioners urged the trustees to collect the delinquent funds, Rosen was indifferent and pressured neither the trustees, the employer nor the union to secure the contributions. Given the condition of the restaurant industry at the time, a suit by the trustees to collect the funds was not a very practical solution since it may have forced the closing of the restaurant and the loss of Rosen's job. I am satisfied that the trustees pursued a course of action that was in plaintiff's best interest and did not breach any fiduciary duty owed him.

In reaching this decision, the Court is mindful of the consideration that the financial integrity of pension funds is to be protected for the benefit of all who may be eligible. The Eighth Circuit in *Phillips v. Kennedy*, 542 F.2d at 55 n.8 commented that

Appendix A—Order and Opinion of Honorable Joseph L. McGlynn, Jr.—Filed March 31, 1980.

> The actuarial soundness of the pension fund is, absent extraordinary circumstances, too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan.

Accordingly, judgment will be entered in favor of the defendants and against the plaintiff.

This Memorandum of Decision contains the Court's Findings of Fact and Conclusions of Law as required by Fed.R.Civ.Pro. 52(a).

ENTERED 4/1/80.

APPENDIX B

Order and Opinion of the United States Court of Appeals for the Third Circuit Dated February 23, 1981

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 80-1699

ROSEN, LEON,

Appellant,

vs.

HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS UNION OF PHILA., BUCKS, MONTGOMERY AND DELAWARE COUNTIES, PA., LOCAL 274 and HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION PENSION FUND and VICTOR P. CIVATTE.

(D. C. Civil No. 77-4252)

On Appeal from the United States District Court for the Eastern District of Pennsylvania.

Present: HUNTER and WEIS, *Circuit Judges* and FISHER, *District Judge**

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* Honorable Clarkson S. Fisher, Chief Judge United States District Court for the District of New Jersey, sitting by designation.

Appendix B—Order and Opinion of the United States Court of Appeals for the Third Circuit Dated February 23, 1981.

JUDGMENT

This cause came on to be heard on the record from the United States District Court for the Eastern District of Pennsylvania and was argued by counsel on October 14, 1980.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court, filed April 1, 1980, be, and the same is hereby reversed and the cause remanded to the said District Court to fashion a judgment against the International Fund and Civatte affording Rosen full pension benefits. Costs taxed against appellees.

ATTEST:

SALLY MRVOS
Clerk

February 23, 1981

Appendix B—Order and Opinion of the United States Court of Appeals for the Third Circuit Dated February 23, 1981.

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 80-1699

ROSEN, LEON,

Appellant,

v.

HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS UNION OF PHILA., BUCKS, MONTGOMERY AND DELAWARE COUNTIES, PA., Local 274 and HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION PENSION FUND and VICTOR P. CIVATTE,

Appellees.

Appeal from the United States District Court for the Eastern District of Pennsylvania.

D.C. Civil No. 77-4252

Argued October 14, 1980

Before: HUNTER, WEIS, *Circuit Judges,* and FISHER,* *District Judge*

(Opinion filed February 23, 1981)

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* Clarkson S. Fisher, Chief Judge United States District Court for the District of New Jersey, sitting by designation.

Appendix B—Order and Opinion of the United States Court of Appeals for the Third Circuit Dated February 23, 1981.

Stanley Lebofsky (Argued)
Weinstein, Leonard & Lebofsky Associates
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Robert W. Costigan (Argued)
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Attorneys for Hotel & Restaurant Employees and Bartenders International Union Pension Fund

Warren J. Borish (Argued)
Meranze, Katz, Spear & Wilderman
Attorneys for Local 274

OPINION OF THE COURT

HUNTER, *Circuit Judge.*

1. Appellant, Leon Rosen, challenges the denial of his pension application by the Hotel and Restaurant Employees and Bartenders International Union Pension Fund (hereinafter "International Fund"). The district court ruled that the International Fund correctly denied Rosen's application because he lacked the fifteen years of credited service required for benefits under the pension plan. We find that Rosen's lack of credited service was caused by his employer's failure to contribute to the pension fund as required under the pension agreement. Further, we hold that under the fiduciary duty standards outlined in the pension agreement, the defendants had a duty to notify Rosen when his employer's contributions to the fund were in arrears and a duty to take action against that employer for continued refusal to contribute to the fund. We therefore reverse and hold that Rosen is entitled to full pension benefits.

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FACTS

2. Plaintiff, Leon Rosen, worked in Philadelphia's Walnut House Restaurant from 1958 to 1974 and continued his employment at the Towne Talk Restaurant until 1976. During this entire period he was a dues paying member of the local union; until 1975 that union was the Chef, Cooks, Pastry Cooks and Assistants Union, Local 111 (hereinafter Local 111). In 1975, Local 111 merged into the Hotel and Restaurant Employees and Bartenders International Union of Philadelphia, Bucks, Montgomery and Delaware Counties, Pennsylvania, Local 274 (hereinafter Local 274).

3. In 1967, pursuant to a collective bargaining agreement, Local 111 created the Local 111 pension fund.[1] Under the pension agreement, benefits were provided to those union members who attained the age of sixty-two years and accumulated fifteen years of "credited service." In determining whether an employee's service is "credited" under the plan, two time frames were used; for periods prior to the adoption of the plan (pre-1967), an employee was credited with one year of service for each uninterrupted year in which he was a dues paying member of the union. For periods after the adoption of

[1] The Local 111 pension fund, and its successor, the International Union Pension Fund, are jointly administered, multi-employer Trusts maintained pursuant to section 302(c)(5) of the Labor Management Relations Act of 1947, 29 U.S.C. §186(c)(5) (1976), established to provide benefits for eligible participants through their respective locals. Defendant, Victor P. Civatte was a trustee of the Local 111 Fund.

the pension plan (post-1967), an employee was given one year of credited service for each 1,600 hours of work for which his employer made contributions to the fund.[2]

4. In 1971 defendant Civatte, Trustee of the Local 111 pension fund, advised Rosen that his pension benefits were in jeopardy because his employer had not been contributing to the pension fund since its inception in 1967. In addition, Civatte gave Rosen a tabulation of his employer's total arrearages to the fund over the past four years—$419.20. Rosen paid this amount personally and Civatte deposited the check into the account of the Local 111 pension fund. It is unclear whether Civatte represented that by paying his employer's arrearages Rosen could preserve his pension eligibility. The testimony conflicts, and the trial court did not make any findings on the question. Nevertheless, at this point Rosen assumed his pension eligibility was intact.

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[2] Section Nine of the Local 111 pension agreement provides:

> *Section 9.* "Credited Service" shall consist of either credited past service, credited future service, or both. For periods on and after the effective date of this Pension Plan an employee will be credited with one (1) year of credited service for each 1,600 hours of work for which contributions are submitted on his behalf, and one-quarter (¼) year of credited service for each 400 hours or portion thereof for which contributions are submitted on his behalf. For periods of time prior to the effective date of this Pension Plan an employee will be credited with one (1) year of credited service for each uninterrupted year in which he has been a member of the Union in good standing from his most recent initiation date or readmittance date.

Appellant's appendix at 52a.

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5. In 1975, Local 111 merged into Local 274 of the International Union and on July 9, 1975 the Local 111 pension plan was incorporated into the defendant International Union Pension Fund. The International Fund assumed all the assets and liabilities of Local 111 pension plan but defendant Civatte did not become Trustee of the successor fund.

6. In 1975, after seventeen years of membership with the Union, Rosen submitted his application to the International Fund for pension benefits. On May 18, 1976 the Fund denied appellant's request stating that according to its records he had a total of fifteen years of credited service, but had not reached the minimum retirement age of sixty-two years. The Fund recommended that Rosen continue working until his sixty-second birthday and then reapply.

7. Rosen reapplied for pension benefits in June 1976 and his request was rejected for a second time. On this occasion, the International Fund responded, contrary to what it said in its letter of May 1976, that Rosen did not have fifteen years of credited service because his employer had not remitted contributions on his behalf from October 1967 to November 1971 and that his subsequent employer had not remitted contributions for the period February 1974 to May 1975. The International Fund rejected Rosen's 1971 payment to Civatte, as an attempt to cure his employer's arrearages. Herman Leavitt, Chairman of the Fund's legal committee, advised Rosen that employers' contributions to the Fund must be made by the employer; "there is no provision in

the pension plan to allow for payment of contributions to the Fund by an employee for the purpose of acquiring credited service toward a pension benefit."[3] The International Fund returned the $419.20 payment to Rosen with five percent interest compounded annually.[4]

PROCEDURAL HISTORY

8. After the International Fund's second refusal of his pension request, Rosen filed suit in the Pennsylvania Court of Common Pleas against the International Fund. Local 274 and Civatte. The defendants removed the case to the Eastern District of Pennsylvania pursuant to the general federal removal statute, 28 U.S.C. §1441 (1976). Rosen filed a motion for summary judgment in which he argued that his employer's failure to make payments from 1967 to 1971 may be a technical bar to recovery, but that the defendants were estopped to assert this defense because Civatte had promised Rosen that personal payment would bring his pension up-to-date. Civatte denied saying that a personal payment by Rosen would cure any pension defects, but admitted meeting with the plaintiff, discussing his employer's arrearages, presenting Rosen with a tabulation of the outstanding debt and depositing Rosen's personal check into the Local 111 pension fund account. The district court recognized the basis for an estoppel argument, but denied the summary judgment motion because there was a question as to what representations Civatte actually made in 1971.

[3] Letter from defendant International Fund to Leon Rosen. (undated) Appellant's appendix 51a.

[4] The record does not indicate what has happened to these funds.

9. At trial, the court held that the International Fund's determination was not arbitrary and capricious and denied Rosen's pension request. In so ruling however, the court never decided the estoppel question left open by the motion for summary judgment. Rather, it assumed an estoppel and hence that Rosen's pension was up-to-date in 1971. But the court found no evidence that any employer contributions had been made on Rosen's behalf from 1971 to 1973; therefore he was still two years short of the required fifteen. In response, Rosen argued that during this time defendants had a duty to notify him of his employer's continued failure to contribute to the Fund and further, that their fiduciary duty required them to take action against the delinquent employer. Pension benefits should not be denied, asserted Rosen, when defendants have breached their fiduciary duty to the pensioner.

10. The court rejected Rosen's claim and held that while the pension fund trustees owed a fiduciary duty to the pensioner, they had complied with their obligations in this case. The trustees visited Rosen's place of employment and allegedly discussed the matter with counsel, but took no action. The court emphasized that Rosen was indifferent and pressured neither the Trustees, the employer nor the union to secure the contributions. By this analysis the court affirmed the pension application denial.

Appendix B—Order and Opinion of the United States Court of Appeals for the Third Circuit Dated February 23, 1981.

MERITS

11. We begin by noting that this case began in state court and was removed to federal district court on the basis of federal jurisdiction under §301(a) of the Labor-Management Relations Act (LMRA), 29 U.S.C. 185(a) (1976). Plaintiff Rosen alleged a violation of the fiduciary duty standard contained in the pension fund agreement. Because this pension plan is an integral part of the collective bargaining agreement, the breach of a section 301 contract has been alleged. *Whelan v. Colgan*, 602 F.2d 1060, 1062 (2d Cir. 1979). Hence the requirements for section 301(a) jurisdiction are satisfied. *See Alvares v. Erickson*, 514 F.2d 156, 161 (9th Cir. 1975); *Nedd v. United Mine Workers*, 556 F.2d 190, 196-97 (3d Cir. 1977).

12. Judicial review of pension trustees' decisions is limited to a determination of whether the trustees' actions were arbitrary and capricious. *Gordon v. ILWU-PMA Benefit Fund*, 616 F.2d 433, 435 (9th Cir. 1980).[6]

[6] We note that, although not alleged, the gist of Rosen's complaint may state a cause of action under §502 of ERISA. 29 U.S.C. §1132(a)(1)(B) (1976). There is some conflict among the circuits as to whether ERISA applies to pension contracts that existed before and after the enactment date (Jan. 1, 1975 for most provisions). *Compare* Reley v. Meba Pension Trust, 570 F.2d 406, 411 (2d Cir. 1977); *and* Morgan v. Laborers Pension Trust Fund for Nothern Cal., 433 F.Supp 518, 522 n.5 (N.D. Cal. 1977) *with* Martin v. Bankers Trust Co., 565 F.2d 1276, 1278-79 (4th Cir. 1977); *and* Finn v. Chicago Newspapers Publishers' Ass'n., 432 F.Supp. 1178, 1179 (N.D. Ill. 1977).

For our purposes, it is enough to say that had this action been brought under ERISA, the same arbitrary and capricious standard of review would apply. Bayles v. Central States Southeast and Southwest Areas Pension Fund, 602 F.2d 97, 100 n.3 (5th Cir. 1979); Bueneman v. Central States Southeast & Southwest Areas Pension Fund, 572 F.2d 1208 (8th Cir. 1978).

Although this is a limited standard of review it "leads neither to abdication of traditional judicial control of fiduciaries nor to excessive judicial intervention in trust operations, in harmony with federal labor policy." *Rehmar v. Smith*, 555 F.2d 1362, 1371 (9th Cir. 1976).

13. To qualify for pension benefits, Rosen must have been at least sixty-two years of age and have had fifteen years of credited service. In June of 1976, when Rosen applied for the second time, he was sixty-two years old. He received nine years of credited service (1958-1967) for his work prior to the adoption of the Local 111 credit plan. This case revolves around whether Rosen received credit for the remaining six years—1967 to 1973. This period can be divided into two parts: first, from the initiation of the plan in 1967 until Civatte deposited the employer's arrearages into the fund. Second, from 1971 until 1973 when, if Rosen's employer had submitted payments, Rosen would have qualified for benefits with fifteen years of credited service.

1967-1971

14. Rosen's employer made no payments to the pension fund on Rosen's behalf during the 1967-1971 period. The defendants argue that Rosen's payment of employer's arrearages did not entitle him to credited service because it was in violation of the pension plan requirement that all contributions be made by the

employer, not the employee.[6] We do not address the merits of this claim because Civatte's acceptance of Rosen's check on behalf of the fund estops the defendants to assert this defense.

15. The principle of estoppel is the "representation of fact made to a party who relies thereon with the right to so rely, [that] may not be denied by the party making the representation if such denial would result in injury or damage to the relying party." 1 S. Williston, *Williston on Contracts* §139, at 600 (3d ed. 1957); *Haeberle v. Board of Trustees of Buffalo Carpenters*, 624 F.2d 1132, 1139 (2d Cir. 1980). We find these elements present and affirm the validity of Rosen's pension until 1971.

16. In 1971, defendant Civatte, then trustee of the Local 111 pension fund, advised Rosen that his pension was in jeopardy due to his employer's failure to con-

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[6] Article II, Section 1 of the pension plan states: "Every employee, as defined herein, on whose behalf payments are made to the Local 111 pension trust fund by an employer, as herein defined, shall be a participant of the pension plan."

Article I, Section 5 of the plan "employer" to be: "any person, firm, association, partnership or corporation contributing to the Local 111 pension trust fund as required by the collective bargaining agreement between such employer and the Local Union, including the Local Union as employer." Defendants argue that these provisions—prohibiting personal payment of employer's debt by employee—were included to prevent an employer from levying a *de facto* reduction in wages upon an employee by forcing him to pay his own contributions. Because we rule that defendants are estopped to assert this defense by Civatte's acceptance of Rosen's personal payment, we do not reach the merits of this claim.

tribute to the fund.[7] It is unclear whether Civatte told Rosen that by paying his employer's arrearages out of his own pocket he could preserve his pension. Nevertheless, Civatte's actions and admitted statements create an estoppel against the defendants. Civatte met with Rosen and discussed the threat to his pension by his employer's failure to contribute; Civatte gave Rosen a tabulation of his employer's arrearages for the 1967-1971 period (Plaintiff's exhibit P-4); Rosen made out a check for $419.20—the total amount of his employer's arrearages; Civatte deposited this money into the account of the Local 111 pension fund. At this point Rosen had every reason to believe that his payment had brought his pension up-to-date. Under the circumstances Rosen's detrimental reliance on Civatte's action was clearly reasonable.[8]

17. Defendants argue that even if the technical requirements for estoppel are present, courts have been reluctant to apply estoppel in pension cases. In *Phillips v. Kennedy*, 542 F.2d 52 (8th Cir. 1976), the court declined to apply estoppel against defendant where the

[7] Defendants argue that Rosen's reliance on Civatte's statements and acceptance of the check in 1971 was unwarranted because, Civatte was only one of the four trustees administering the fund and hence he did not have the actual authority to make decisions for the plan. We reject this argument. In 1971, Civatte was the secretary of the Trustees for the trust fund and this position created the apparent, if not the actual, authority to act on the Trust's behalf. Hence Rosen's reliance on Civatte's representations was reasonable.

[8] The International Fund's May 18, 1975 letter which stated that Rosen did have fifteen years of "credited service" is an additional factor supporting Rosen's claim of detrimental reliance.

local union official and a fund trustee made assurances to plaintiff that he would be included in pension plan. The court stated: "The actuarial soundness of pension fund is, absent extraordinary circumstances too important to permit trustees to obligate the fund to pay pensions to persons not entitled to them under the express terms of the pension plan. *Phillips*, 542 F.2d at 55 n.8. *See also Thurber v. Western Conference of Teamsters Pension Plan*, 542 F.2d 1106, 1109 (9th Cir. 1976). We are sensitive to the *Phillips* court's concern for actuarial soundnes, but that is not an issue in this case.[9] In our case Rosen relied on more than mere assurances made by the trustees. Civatte deposited his monies into the Fund's account. Indeed, this case can be classified as one of the "extraordinary circumstances" as outlined by the *Phillips* court.

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[9] The $419.20 which Civatte deposited into the fund covered contributions for all but two years of the required fifteen. On the question of actuarial soundness we agree with the analysis of the ninth circuit in Aitken v. IP & GCU-Employer Retirement Fund, 604 F.2d 1261, 1268 (9th Cir. 1979):

> We perceive no substantial danger to the actuarial soundness of the defendant fund if they are required to pay retirement benefits to plaintiff in accordance with the terms of the retirement plan agreement. . . .Plaintiff may end up receiving more in benefits from the Fund than the Fund has received as a result of his contributions, or he may receive less; this is the expected actuarial risk which the Pension Fund takes with all participants.

Id. (footnotes omitted). In addition this case does not involve a suit for punitive damages against the fund so Rosen's recovery is limited to the forty-eight dollars per month he is entitled to under the plan agreement.

18. Further, the application of estoppel in pension disputes is not altogether novel. In *Scheuer v. Central States Pension Fund*, 358 F.Supp. 1332 (E.D.Wis. 1975), *on rehearing*, 394 F.Supp. 193 (E.D.Wis. 1975) *aff'd*, 570 F.2d 347 (7th Cir. 1977), the court held a trustee's decision to deny a pension as arbitrary in light of prior assurances to the employee that he would qualify. On applying the law of estoppel in the area of pension agreements the court said:

> The *sui generis* nature of the pension agreement ... should not immunize it from the equitable principles that govern similar agreements. The rising ethical standards in business relations which the estoppel doctrine is designed to enforce are no less needed in the administration of pension funds ... If anything, estoppel is appropriate here. The complexity of the typical fund agreement and the trustees' freedom to decide as they wish make it unlikely that workers will disregard promises made to them.

Id. at 1338. We agree with this analysis. The argument for estoppel in this case is similar to that in *Scheuer*. Rosen was initially approached by Civatte with the tabulation of his employer's arrearages and then paid this debt from his own funds. The existence of this tangible detrimental reliance bars the Fund from now denying his pension on the basis of that payment.

Appendix B—Order and Opinion of the United States Court of Appeals for the Third Circuit Dated February 23, 1981.

1971-1973

19. When Rosen's second application for pension benefits was denied, Herman Leavitt, chairman of the International Fund's legal committee told Rosen that his employer had failed to contribute funds from 1967 to 1971 and from 1974 to 1975. It was revealed for the first time at trial that Rosen's employer also failed to contribute from 1971 to 1973. It is this latter period—the fourteenth and fifteenth year of Rosen's service under the terms of the plan—that raises the question of defendants' fiduciary duty. Rosen asserts that as fiduciaries, Civatte and the International Fund had an obligation to inform him of his employer's arrearages, and further to take action against the employer for his failure to contribute as required by the pension plan. The district court found that the International Fund and Civatte had such a duty, but discharged it in this case. We agree that the duty existed but not that it was discharged.[10]

20. Identifying the source of a fiduciary duty is the first step in determining the obligation required to discharge it. In this case, defendants' duty originates in the pension agreement. Article Nine states:

[10] Under the circumstances here, the defendant International Union does not have a fiduciary duty to oversee the employer's pension payments. While the union does owe a duty of fair representation to its members, Findley v. Jones Motor Freight, Nos. 80-1486-87, 80-1705 slip op. at 3 (3d Cir. Jan. 21, 1981), it does not control, nor is it in a position to oversee, the employer's contributions to the fund. United States v. Santiago, 528 F.2d 1130, 1133 (2d Cir.) *cert. denied*, 425 U.S. 972 (1976). Hence, the discussion of defendants' fiduciary obligations to pensioners will refer to the International Fund and Civatte only.

Appendix B—Order and Opinion of the United States Court of Appeals for the Third Circuit Dated February 23, 1981.

FIDUCIARY DUTIES

9.01 The Trustees, Plan Administrators, Investment Managers and others acting as fiduciaries of the Pension Fund and Pension Plans administered hereunder shall discharge their duties:

(a) Consistent with the requirements of ERISA and in the sole interest of the beneficiaries of the Pension Plans; and

(b) so as to keep the assets of this Trust within the jurisdiction of the United States Courts.

Amended Pension Agreement, Appellant's appendix at 72a. This section incorporates the fiduciary requirements of ERISA, located at §404, 29 U.S.C. §1104 (1976). These standards require the fiduciary of a pension fund to:

> discharge his duties with respect to a plan solely in the interest of the participants and their beneficiaries and—
>
> (A) for the exclusive purpose of:
>
> (i) providing benefits to participants and their beneficiaries; and
>
> (ii) defraying reasonable expenses of administering the plan;
>
> (B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims; . . .

Id. §1104(a)(1)(A) & (B).

The Chairman of the Senate Committee on Labor and Public Welfare, providing a context for these standards, emphasized the need for a uniform body of federal law founded on the principles of common law trusts:

> [T]he legislation [ERISA] imposes strict fiduciary obligations on those who have discretion or responsibility respecting the management, handling, or disposition of pension or welfare plan assets. The objectives of these provisions are to make applicable the law of trusts; to prohibit exculpatory clauses that have often been used in this field; to establish uniform fiduciary standards to prevent transactions which dissipate or endanger plan assets; and to provide effective remedies for breaches of trust.

120 Cong. Rec. 15737 (1974) (Comments of Sen. Williams when introducing the Conference Report), *reprinted in*, [1974] U.S. Code Cong. & Ad. News 5177, 5186. This language indicates that in applying the fiduciary standards of ERISA, counts are to be sensitive to the need for uniformity in the interpretation of pension trustee's obligations.

21. At a minimum, the fiduciary obligations of a pension fund trustee require that he notify the pensioner of his employer's failure to contribute to the fund as required by the pension agreement. This duty has roots at

common law[11] and was expounded more recently by the eighth circuit in *Phillips v. Kennedy*, 542 F.2d 52, 55 n.8 (1976). In *Phillips*, the court denied pension benefits to an employee's widow because of a break in service during the deceased employee's union tenure. In so doing however, the court was careful to elaborate on the pension fund trustee's continuing duty to inform the plan participants of their eligibility: "We do emphasize, however, that it is the duty of the trustees to verify on a regular basis the eligibility of those for whom contributions are being made. The breach of that duty might well expose the trustees to personal liability in an appropriate case." *Id.* In *Aitken v. IP & GCU-Employer Retirement Fund*, 604 F.2d 1261, 1271 (9th Cir. 1979), the court declined to impose precise limits on the trustee's fiduciary duty to notify beneficiaries, but did say that it included the "obligation to inform an applicant, and his contributing employer, of the applicant's ineligibility within a reasonable time after the Committee acquires knowledge of that ineligibility." 604 F.2d at 1271 (footnote omitted).

---

[11] The Restatement of Trusts (Second) underscores the trustee's duty to communicate material facts to the beneficiaries:

> [The trustee] is under a duty to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection in dealing with a third person with respect to his interest.

Restatement (Second) of Trusts §173, Comment b, (1959).

22. We agree with the standard enunciated in *Phillips* and supported in principle by *Aitken*. If a trustee's fiduciary duty requires anything in the administration of the trust, it requires him to inform the pensioners of their employer's failure to make the required contributions to the fund. Continued eligibility is the core of the trustee beneficiary relationship and those responsible for the administration of the fund are required to notify pensioners when their employer jeopardizes their eligibility. *See Phillips*, 542 F.2d at 55 n.8. In this case, the defendant Fund and Civatte failed to contact Rosen about his employer's arrearages from 1971 to the end of his employment in 1976. Indeed, the International Fund's first communication to Rosen stated, erroneously, that he had accumulated the requisite fifteen years of credited service. This misinformation does not comport with their responsibility as fiduciaries.

23. In addition, defendants' status as fiduciaries requires them to take action against employers who fail to contribute to the fund as required by the plan. This obligation could require the trustees to commence suit, or to picket the non-contributing employer; but some action must be taken to safeguard beneficiaries' credited service.[12] In this case defendants claim that such action was contemplated against Walnut House, Rosen's employer from 1971 to 1975, but was not taken because plaintiff's sister-in-law owned the restaurant and defendants were reluctant to get embroiled in a family dispute.

[12] Defendant Civatte stated at trial that he thought he discussed the problem of non-payment with legal counsel, but no action was taken.

While it is true Rosen's sister-in-law owned Walnut House, she sold all interest in the restaurant in 1969. From 1969 to 1971 it was owned by Mr. Kane who thereafter sold it to Mr. Gonzales. Hence defendant's claim of inaction out of a deference to familial relations is not supported by the facts. The crucial time frame is 1971 to 1973. Rosen's sister-in-law sold the restaurant in 1969.

24. Defendants argue in the alternative that their inaction was explained by the precarious financial situation of the restaurant business in the early seventies. Civatte testified that many area restaurants were forced out of business between 1966 and 1976 and pressing the employer for pension contributions would have risked the employer's financial collapse. We cannot accept this rationale. Rosen's payment of his employer's obligations over four years was a little over four hundred dollars. There is no evidence to suggest that this amount would risk the employer's financial ruin. Plainly, defendants' sole alleged action—contacting a lawyer and deciding not to act—does not discharge their responsibility as fiduciaries. Defendants are therefore liable for the benefits that would have accrued to Rosen had they fulfilled their fiduciary duties.

25. In conclusion, we hold that the Fund's denial of Rosen's benefits was arbitrary and capricious. The district court's judgment is reversed and the case remanded to that court with instructions to fashion a judg-

ment against the International Fund and Civatte affording Rosen full pension benefits.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

APPENDIX C

Order of the United States Court of Appeals for the Third Circuit Dated March 20, 1981

UNITED STATES COURT OF APPEALS

For the Third Circuit

No. 80-1699

LEON ROSEN,

Appellant,

v.

HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS UNION OF PHILA., BUCKS, MONTGOMERY AND DELAWARE COUNTIES, PA., LOCAL 274 and HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS INTERNATIONAL UNION PENSION FUND AND VICTOR P. CIVATTE,

Appellees.

SUR PETITION FOR REHEARING

Present: SEITZ, *Chief Judge,* ALDISERT, ADAMS, GIBBONS, HUNTER, WEIS, GARTH, HIGGINBOTHAM and SLOVITER, *Circuit Judges.*

Appendix C—Order of the United States Court of Appeals for the Third Circuit Dated March 20, 1981.

The petition for rehearing filed by

Appellees

in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT,

JAMES HUNTER, III
James Hunter, III
Judge

Dated: March 20, 1981

APPENDIX D

Order of the Supreme Court of the United States Extending Time to File Petition for Writ of Certiorari Dated June 5, 1981

SUPREME COURT OF THE UNITED STATES

No. A-996

HOTEL AND RESTAURANT EMPLOYEES & BARTENDERS UNION OF PHILADELPHIA, ETC., *ET AL.*,

Petitioners,

v.

LEON ROSEN.

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

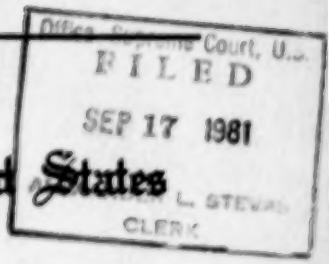
UPON CONSIDERATION of the application of counsel for petitioner(s),

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including August 17, 1981.

/s/ WILLIAM J. BRENNAN, JR.
Associate Justice of the Supreme Court of the United States

Dated this 5th
day of June, 1981

No. 81-308



In The

Supreme Court of the United States

October Term, 1981

LEON ROSEN,

Respondent,

vs.

HOTEL AND RESTAURANT EMPLOYEES AND BARTENDERS INTERNATIONAL PENSION FUND,

Petitioner,

and

VICTOR P. CIVATTE,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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No. 81-308

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and

VICTOR P. CIVATTE,

Petitioner.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the Third Circuit

BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

STATEMENT OF THE CASE

This is an action in equity to compel payment of a pension in the sum of $48 per month. Respondent Leon Rosen was a member of "Hotel and Restaurant Employees and Bartenders Union of Philadelphia, Bucks, Montgomery and Delaware Counties, Pennsylvania, Local 274 AFL-CIO", the successor to the "Chefs, Cooks, Pastry Cooks and Assistants Union, Local 111." The pension plan was originally formed by Local 111 in October 1967 and provided benefits to members with at least fifteen (15) years of credited service and who attained age sixty-two (62). Credit was given for prior years of service between January 1958, when the Union was formed, and the plan's establishment in October 1967. In 1975 the plan merged with petitioner Hotel and Restaurant Employees and Bartenders International Union Fund (hereinafter referred to as "the Fund"). Petitioner Victor P. Civatte was a trustee of the Local 111 Pension Fund during the period of time around which this litigation arises.

Inasmuch as respondent was given credit for the period from January 1, 1958 until October 1967, we are only concerned with whether respondent should receive credit for the period from October 1967 until September 1973. If so, he would then satisfy the requirement of having attained fifteen (15) years credit service.

Respondent was employed by the Walnut House Restaurant, owned by his sister and brother-in-law, Mr. and Mrs. Specter from 1957 to 1967. In 1967, the year in which the plan was formed, the business was sold to Herman Kane who in turn sold it to a Mr. Gonzalez in 1971. Mr. Rosen was continuously employed at this location from 1957 to 1974. He was a dues-paying member of the Union from 1958, when the Union was formed, until 1976 when he applied for his pension.

Respondent elected to retire in 1976 and believing himself to be eligible for his pension upon his 62nd birthday on June 24, 1976, he applied for his pension.

The Fund, by letter dated May 18, 1976, informed respondent that although he had attained fifteen (15) years of completed service, he was not eligible to apply at that time because he had still not reached age 62. He then re-applied in June, following his 62nd birthday and was informed by the Fund, for the first time, that he was ineligible for his pension because his employer for the period 1967-1971 had failed to make required contributions on his behalf.

It is agreed that respondent's employer during this period failed to make the required contributions. In fact, in 1971, petitioner Civatte, for the first time, informed respondent of this fact and further informed him that in order to cure this defect and protect his eligibility respondent would have to personally pay the sum of $419.20 representing contributions of approximately $10 per month. Based upon Civatte's representations, respondent paid the $419.20 which was accepted by the local plan and later transferred to and accepted by the Fund. Following this payment there was no further contacts between respondent and petitioners or the Union regarding respondent's pension eligibility and respondent was not aware of any problems until 1976. The trustees and other union representatives had been aware all along that no contributions had been made on respondent's behalf for the period 1967-1971 but never sought to take positive action to compel payments. Civatte testified that picketing was considered but was rejected because of respondent's family relationship to the owners even though Rosen himself was not consulted. Inasmuch as respondent's brother-in-law and sister sold the business in 1967 there was no family relationship existing during that time period. In fact, petitioners offered no evidence of any type of

action taken during this 1967-1971 period to collect the contributions other than requests to the employer to make the payments. Furthermore, there was no evidence that respondent was even made aware of the deficiency until 1971 when he was so informed by Mr. Civatte. Despite their acceptance of respondent's payment, petitioner the Fund, rejected his eligibility for a pension because of the lack of employer contributions during this four (4) year period. The district court did not feel it necessary to determine whether respondent should be given credit for service for this period. The court concluded that since respondent failed to present proof of contributions for the period subsequent to November 1971 he had failed to establish fifteen (15) years of credited service regardless of the status of the 1967-1971 period (respondent's attaining fifteen years occurred in 1973). It was only during trial that any question of post-1971 contributions arose. Neither respondent nor the Union, a petitioner, had ever theretofore raised the question of non-contribution subsequent to 1971. All pleadings, motions, responses, answers, and correspondence referred to the 1967-1971 period. The trial court's burden to respondent to present evidence of payment for the post-1971 period, years after the fact, was obviously impossible and subsequent to trial the court permitted petitioners to file amended pleadings in order to raise the defense.

The district judge also determined that the trustees of the plan owed a fiduciary duty to respondent but concluded that despite their inaction they had met and fulfilled that duty because they asked the employer to make up the deficiency and discussed the matter with counsel.

The Third Circuit Court of Appeals reversed the district court with respect to petitioners herein based upon the failure of the Fund and its trustees to fulfill their fiduciary obligations to respondent. They held that some type of affirmative action must

be undertaken to collect contributions before a trustee can be considered to have carried out his fiduciary duties and further held that a beneficiary must be informed of his employer's failure to make contributions.

The Court of Appeals further found that the Fund was estopped from asserting the lack of contributions for the 1967-1971 period. However, it is submitted that the Court of Appeals' finding as to the breach of fiduciary duty would apply to the entire 1967-1973 period and render moot any question of estoppel.

REASONS FOR DENYING THE WRIT

Petitioners urge a review of the Court of Appeals' holding that the trustees of the Fund were obligated to take some affirmative action in order to attempt to collect pension contributions from respondent's employer. Petitioners argue that the court is limited to a determination of whether a trustee's action is "arbitrary and capricious." Though the Court of Appeals concluded that the Fund's denial of benefits was arbitrary and capricious, it based such finding not on the Fund's eventual determination that respondent was not eligible under the terms of the plan itself, but upon the trustee's prior failures to fulfill their fiduciary duties to respondent. The Fund's denial of benefits was not arbitrary and capricious because they improperly determined that respondent was not eligible according to the terms of the plan itself but because it was the inaction of the trustees which caused and led to the technical ineligibility. The Court of Appeals recognized this when in discussing the "arbitrary and capricious" standard it stated:

> "Although this is a limited standard of review it leads neither to abdication of traditional judicial control of fiduciaries nor to excessive judicial

> intervention in trust operations, in harmony with federal labor policy." [citing *Rehmar v. Smith*, 555 F. 2d 1362, 1371 (9th Cir. 1976) Appendix B 22a].

Petitioners contend that a trustee has no obligation to take action against a non-contributing employer in order to secure a worker's pension and that trustees fulfilled their obligations to respondent in unilaterally deciding *not* to attempt to collect the contributions. The Court of Appeals held that some action must be taken. It is conceivable that a letter threatening legal action would have sufficed. Petitioners argue that a lawsuit to enforce collection was impractical in that the costs of suit would far outweigh the benefit to be gained (Petition, p. 8). No statement by respondent could more clearly indicate the attitude of petitioners in determining in whose interest they acted. The "outweighed" benefit is respondent's very modest pension of $48 per month. The fact that Rosen was a dues-paying union member since the union's inception was ignored. The fact that he worked in the industry for a major portion of his life was ignored. The fact that the contribution was measured in pennies a day was ignored. A lawsuit was shunned because the cost outweighed the benefit. The filing fee in Philadelphia in 1967 to institute suit for such an amount was about $14. In all probability the institution of the suit alone would have resulted in payment. Petitioners claim that such action could force the employer out of business, yet there were no facts presented to support such a claim. It is unbelievable that an obligation of $2 per week would force the employer out of business, particularly one with three employees and which was readily saleable. The Fund retained an attorney and it is probable that some minimum action would have resulted in payment by the employer, yet nothing was done.

Petitioners object to a finding which places upon them a burden to protect the interests of their members. They are

unable to present a single positive action they undertook to protect Leon Rosen. Petitioners' lack of regard for respondent's interest is further highlighted by the fact that it was only after four years of not collecting contributions that they even informed Leon Rosen and attempted to cure the problem. Then they permitted the same history of non-collection to thereafter exist. Petitioners argue that Rosen was then aware of the situation so he knew he was ineligible for a pension. Yet what did Leon Rosen know and what could he do. It was not up to him to make collections. He was a restaurant worker, seemingly covered by a pension plan negotiated on his behalf. His representatives were aware of prior problems and he had every reason to expect that they would not let the problems arise again. Yet the Fund would place proper administration of the plan upon Rosen. In fact when he applied for his pension he was initially told that he was eligible. Later the Fund reversed their position based upon their conclusion that they should not have accepted Rosen's payment for the 1967-1971 period. They never raised any question of lack of payment for the period from 1971 to 1973. Even after suit was instituted on respondent's behalf, there was never any defense raised regarding a lack of contributions for years after 1971. Only during trial was the issue raised and the impossible burden placed upon Rosen to prove that payments had been made in his behalf for the 1971-1973 period. Subsequent to trial the court permitted petitioners to amend their pleadings to enter this defense. It is revealing that petitioners were unable to even produce complete records concerning respondent's account yet Rosen was given the burden of proving that the Fund received payment.

The Court of Appeals concluded that the Fund's acceptance of Rosen's voluntary payment in 1971 estopped them from asserting a defense of non-payment for the period of 1967-1971. *Scheuer v. Central States Pension Fund*, 358 F. Supp. 1332 (E.D. Wis. 1975), *on rehearing*, 394 F. Supp. 193 (E.D. Wis. 1975), *aff'd*, 570 F. 2d 347 (7th Cir. 1977).

The question of estoppel becomes a moot point in light of the Court of Appeals' conclusion that the trustees failed to carry out their fiduciary duty. If such is the case the voluntary payment by Rosen is of no significance. Petitioners seem to recognize that the trustees had some obligation to protect Rosen but contend that they fulfilled that obligation. They feel that since the matter was discussed with counsel and a decision made not to attempt collection, they have therefore fulfilled their obligations. The Court of Appeals' conclusion that "some action" was required by the trustees is nothing more than a declaration of what has always been the standard applied to fiduciaries. A trustee cannot sit back, after failing to protect a beneficiary's interest, and absolve himself of responsibility by his declaration that he decided that affirmative action was too burdensome when weighed against the benefit to be derived by such action. This is not as complex and substantial a burden as petitioners would have the Court believe.

Petitioners voice concern regarding the effect of the Court of Appeals' decision on the actuarial soundness of pension funds. Obviously, if trustees properly fulfill their duties the actuarial soundness of pensions will not be affected. If a member's employer fails to make his required contributions and the trustee has made an effort to collect same, then the Fund will not be exposed to liability to non-eligible members. At the very least, the Court of Appeals' decision will no longer permit a worker to spend his years in the labor market without at least being made aware of his pension status. The protection of the employee is of paramount importance and the Court of Appeals sought only to insure that protection.

Petitioners feel that this Court should issue a writ of certiorari because of conflict of decisions between the circuit courts.

In *Scheuer v. Central States Pension Fund, supra,* the Seventh Circuit Court of Appeals affirmed, without opinion, the district court's finding that equitable estoppel may be a basis for relief in actions by employees to receive pension benefits.

In *Thurber v. Western Conference of Teamsters Pension Plan et al.,* 542 F. 2d 1106 (1976) and in *Aitken v. I.P. & G.C.U. Employer Retirement Fund,* 604 F. 2d 1261 (9th Cir. 1979) the Ninth Circuit Court of Appeals refused to apply the doctrine of equitable estoppel since to do so would be to compel an illegal act.

However, there is a fundamental difference between *Thurber* and *Aitken* on the one hand and *Scheuer* and the instant case on the other.

In *Thurber* a payment was made 11 years after an employee had a "break in service" in order that the employee would be made eligible for early retirement. The break in service was an actual break in service where the employee was in fact not employed and even if contributions had been made during the break he would not be eligible. Similarly, in *Aitken,* the claimant was ineligible for a pension because he had become a sole proprietor. In both cases the court specifically found that the granting of a pension would be illegal even though the requisite funds had been paid and even if they had been paid during the period of the break in service. Based upon the otherwise ineligibility of claimants the court refused to invoke estoppel to compel an illegal act.

In *Scheuer* however, the employee's break in service was not an actual break but one that arose because of a technical change of his employment status. Claimant was a hauler for his employer and owned his own tractor. The employer then hired a private delivery company to do its hauling. At the direction of

the delivery company claimant leased his tractor to the delivery company and claimant had the right to employ the driver who in fact was himself. The delivery company made no contributions even though claimant continued to work as before. Thereafter, based upon a union representative's promise that he would be eligible for a pension if the contributions were made the employee arranged to pay the funds to his employer who made the required contribution to the plan. The court, in applying the doctrine of estoppel found that based upon these facts concerning status as an employee, the trustees could have found him eligible had the contributions been made all along. As in the present case the claimant's eligibility based on years of service was not at issue — only the question of contributions having been retroactively made. Unlike *Thurber* and *Aitken* there was no specific finding that a decision to grant the pension would be illegal.

A retroactive contribution cannot be applied to impose eligibility on one otherwise ineligible for a pension. However, where the employee is otherwise eligible for his pension and a plan accepts the late contribution with a promise of eligibility they are then estopped from denying that eligibility. In such cases the estoppel is not invoked to compel an illegal act. The *Scheuer* decision, as in the present case, found the elements of estoppel to be present based upon the promise of eligibility. There is no illegality with which to be concerned in the instant case inasmuch as Rosen's eligibility was admitted except for the voluntary payment.

Additionally, respondent is hard-pressed to understand the Fund's reluctance to give credit for this voluntary payment. The Fund is obviously concerned with the actuarial stability of its plan yet maintains that an employee contribution is improper. It certainly seems reasonable to assume that the plan would embrace a system whereby the employee of a non-contributing

employer would keep the payments current. In such manner the plan would be better assured of its financial stability unless they are more desirous of avoiding payments rather than making them. One cannot help wonder of the plan's position had Rosen given the funds to his employer as in *Scheuer*, who would then make the payments. The Fund accepted the payment and years later took the position that Rosen was not eligible and at all thereafter times worked to defeat the rights of one of its members. Such course of conduct, in rejecting one's eligibility for a $48 per month pension is entirely in opposition to the main purpose of the plan — that of providing a benefit to its members.

CONCLUSION

The Court of Appeals, in directing that pension plan trustees take action to protect the rights of covered employees, has merely restated the duties which fiduciaries have historically been required to fulfill. The simple fulfillment of these duties will not impose an unreasonable burden on trustees of employee benefit plans nor deprive them of their exercise of discretion in protecting their beneficiaries. An adherence to their duties can only lead to increased efficiency in the administration of plans and increased protection for those workers for whom they purport to act.

The question of estoppel in this particular case is secondary to these responsibilities for if the trustees failed to act properly the failure existed from the inception of the plan until respondent's retirement.

There is no conflict of decisions among the circuits, which have properly ruled that estoppel cannot be invoked to compel an illegal act but can be invoked to compel an act that is not found to be illegal.

WHEREFORE, respondent respectfully requests this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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Attorneys for Respondent